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Supreme Court, U.S.

FILED

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No. [redacted]

IN THE
SUPREME COURT OF THE
UNITED STATES

ROSALINA DE LA O, ADMINISTRATRIX
FOR THE ESTATE OF JESUS DE LA O

Petitioner,

v.

HOUSING AUTHORITY OF
THE CITYOF EL PASO

Defendant.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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Question Presented

The district judge denied Petitioner's Motion for Summary Judgment and granted the Respondent's (Defendant in the trial court) Motion for Summary Judgment on July 13, 2000. Petitioner appealed the grant of summary judgment for Respondent to the Fifth Circuit Court of Appeals on August 11, 2000. By Opinion revised November 15, 2001, the Court of Appeals reversed and remanded the matter to the trial court. Respondent filed a timely motion for rehearing en banc that the court granted and upon which grant the opinion was vacated. Petitioner passed away prior to oral argument or decision on the matter. The Court of Appeals then denied Petitioner's Motion to Substitute the Administratix of the Petitioner's estate for the Petitioner and granted Respondent's Motion to Dismiss the appeal as moot.

The question presented for review is:

Whether the court of appeals erred by failing to apply the proper standard for determining whether Petitioner's 42 U.S.C. Section 1983 action survived his death, thus requiring that the vacated opinion of the court of appeals be reinstated or substantively reviewed for a decision on the merits.

List of Parties and Rule 29.6 Statement

The parties to the proceedings before the United States Court of Appeals for the Fifth Circuit were Petitioner Jesus de la O, now deceased, Rosalina de la O as the Administratix of his Estate, and the Housing Authority of the City of El Paso.

The Housing Authority of the City of El Paso is a public entity having its own Board of Directors to set and enforce policy regarding the operation of public housing for the City of El Paso.

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Petitioner Rosalina De La O, as Administratrix to the Estate of Petitioner Jesus De La O, Deceased, respectfully petitions for a writ of certiorari to review the order of the United States Court of Appeals for the Fifth Circuit.

Opinion Below

The court of appeals order is not published but is reprinted in the appendix hereto at pages A1 to A2. The court of appeals original opinion was vacated but is reprinted in the appendix at pages A3 to A28. The district court's opinion is not published but is reprinted in the appendix at page A29 to A48.

Jurisdiction

The court of appeals entered its order denying substitution of the administratrix for the estate of the deceased party and dismissing the appeal as moot on September 23, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 2101(c).

Statutory Provisions and Doctrines Involved

U.S.C. Section 1983 of Title 42 allows private individuals to seek redress for damages caused under color of law in violation of a right, privilege or immunity protected by the U.S. Constitution or federal statute.

Under federal law, whether an action brought pursuant to 42 U.S.C. Sec. 1983 survives the death of a party is determined by the law of the forum state. The statutory authority for survival of causes of action for personal injury to the health, reputation or person of an injured person after death of a party is set forth under Texas Civil Practice and Remedies Code, Sec. 71.201.

Statement of the Case

The underlying action arose when Petitioner, along with a candidate for public office who did not join in the appeal, filed suit challenging Respondent Housing Authority of the City of El Paso's (HACEP) regulation under which Petitioner and the candidate were precluded from engaging in verbally campaigning and distributing leaflets in the public housing. Petitioner was a long-time public housing resident, and his wife and Administratrix still resides in public housing. Petitioner brought his suit pursuant to 42 U.S.C. Sec. 1983 claiming deprivation of rights protected by the First and Fourteenth Amendments to the United States Constitution. He sought declaratory and injunctive relief as well as damages caused by HACEP.

The district court, in its Memorandum Opinion and Order, determined that the housing development was a non-public forum and that the challenged regulations were a reasonable response to relevant

safety concerns by HAPEC for the tenants and granted HAPEC's Motion for Summary Judgment. On appeal, the parties did not dispute the facts and sought determination purely on the legal issues. The court of appeals initially found that Petitioner had a right to receive information which was protected by the First Amendment. The court of appeals agreed that HAPEC's public housing constituted a non-public forum, but it found that the regulations unreasonably interfered with Petitioner and other residents' right to receive information and to have an unfettered role in the political process. It, thus, reversed and remanded the matter to the district court.

Upon timely motion from Respondent, the court of appeals vacated the Opinion of the panel and granted a hearing en banc. Prior to argument or decision, Petitioner passed away. Petitioner moved to substitute his Administratrix, Rosalina De La O, and Respondent moved to dismiss the appeal as moot. Rosalina De La O, as substitute Appellant/Plaintiff, represented the Estate and was also a tenant subject to the same capricious and unreasonable regulations and policies. The estate itself had no debts, and the only significant asset was the potential recovery of damages and the costs of litigation, including necessary and reasonable attorney's fees.

The court of appeals denied Petitioner's motion and granted that of Respondent, thereby dismissing the appeal. The order

did not set forth the reasons for dismissal, nor does it state the applicable standard for survival. The dissent, however, sets forth the clear standard and the court's departure from the standard.

Reasons for Granting the Petition

The court of appeals order constitutes a drastic departure from well-established law regarding survival of an action upon the death of a party. The order conflicts with state court cases setting the standard for survival of cases in the forum, and it departs from the accepted and usual course of the federal standard of application of the law of the forum in the proceeding so as to necessitate this Court's supervisory power.

This Court has held that the survival of actions brought pursuant to 42 U.S.C. Sec. 1983 is to be determined by the law of the forum state. ***Robertson v. Wegmann,*** 436 U.S. 584, 98 S.Ct. 1991, 55 L.Ed.2d 554 (1978). Prior to its order in this case, the court of appeals has followed this Court and determined survival of Sec. 1983 actions based upon the law of the forum state. ***Caine v. Hardy***, 943 F.2d 1406, 1410 (5th Cir. 1991). The departure allows the court of appeals to depart from or ignore this Court's recent holding that supports the vacated panel opinion regarding the merits of the Sec. 1983 claim without having to address the matter by rehearing or by affirmation of the vacated panel opinion.

The original panel opinion of the court of appeals held that Petitioner's constitutionally protected right to participate meaningfully in the political process was violated by Respondent's regulations. Petitioner passed away after the court of appeals had vacated the opinion and granted a rehearing en banc to consider the panel opinion's apparent conflict with a similar situation in another circuit. After the opinion was vacated, this Court specifically held that persons, particularly those with less economic resources limiting full participation in elections, had the right to receive information regarding issues and candidates and the right to meaningful participation in the political process by means of door-to-door canvassing in non-public forums. ***Watchtower Bible and the Society of New York, Inc., et al. v. Village of Stratton, et al.***, 536 U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (No. 00-1737, decided June 17, 2002). This Court's holding resolved any conflict between the circuits and supported the vacated panel opinion.

Without its drastic departure and refusal to apply the law of the forum state to the issue of survival of the cause of action, the court of appeals avoided review of the substance and reinstatement of the panel opinion. The result is patently unjust to Petitioner's estate, which loses any damages related to his injury from the breach of constitutional rights as well as to his widow an other

tenants who are left with the prospect of undergoing considerable litigation costs to initiate a new challenge to the continuing policies.

Under Texas law, a cause of action for personal injury to the health, reputation or person of an injured person survives the death of the claimant or of the person liable. ***Tex. Civ. Prac. & Rem. Code, Sec. 71.021 (V.A.T.S. 1985).*** This section provides for the survival of a cause of action by which a decedent may have sought recovery for personal injuries, pain and suffering, and other damages suffered prior to his or her death. ***Goode v. Shoukfeh,*** 863 S.W.2d 547, 551 (Tex.App.—Amarillo 1993, no writ). The statute does not create a separate cause of action but, rather, provides that it survives the death of the claimant. ***Parrott v. Caskey***, 873 S.W.2d 142, 150 (Tex.App.—Beaumont 1994, no writ). Generally, the representatives of the estate are the only persons entitled to sue to recover estate property and, thus, are the persons who can substitute as a party in the survival action. ***Stewart v. Hardie***, 978 S.W.2d 203, 207 (Tex.App.—Fort Worth 1998, pet. denied). Here, the estate's representative was the party who sought to be substituted for Petitioner to continue with the appeal.

Texas law recognizes that deprivation or any significant denigration of First Amendment rights inflict irreparable injury and constitute irreparable harm to the claimant.

Iranian Muslim Organization, et al. v. City of San Antonio, et al., 615 S.W.2d 202, 208 (Tex. 1981). Furthermore, Texas law holds that preservation of appellate review of government conduct that violated constitutional rights is proper even where the matter might otherwise be moot for appellate review. ***Spring Branch I.S.D. v. Reynolds***, 764 S.W.2d 16, 18 (Tex.App.—Houston [1st Dist.] 1988, no writ). Consequently, the law of the forum state in this 42 U.S.C. Sec. 1983 matter recognizes that violation of First Amendment rights constitutes irreparable harm, and appellate review of the governmental conduct causing such injury survives what otherwise might constitute mootness on appeal.

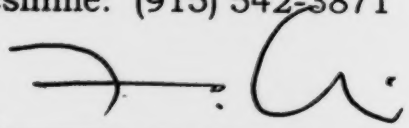
In this case, the court of appeals has drastically departed from the accepted and usual course of judicial proceedings of both the federal courts and the law of the forum state. Its departure necessitates this Court's supervisory intervention to correct the patent injustice resulting from the court's order.

Conclusion

This petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

U. S. COURT OF APPEALS
FILED
SEP 23 2002
CHARLES R. FULBRUGE III

ROBERTO S VASQUEZ; ET AL
Plaintiffs
JESUS DE LA O
Plaintiff-Appellant

v.

HOUSING AUTHORITY OF THE CITY OF EL PASO
Defendant-Appellee

- - - - - - - - - - - - - - - - -

Appeal from the United States District Court for the Western District of Texas, El Paso

- - - - - - - - - - - - - - - - -

Before KING, Chief Judge, JOLLY, HIGGINBOTHAM, DAVIS, JONES, SMITH, WIENER, BARKSDALES, EMILIO M. GARZA, DeMOSS, BENAVIDES, STEWART, DENNIS, and CLEMENT, Circuit Judges. [1]

BY THE COURT:

IT IS ORDERED that the motion to substitute Rosalina De La O, Administratrix of the Estate of Jesus De La O, for plaintiff-appellant Jesus De La O (who is deceased) is DENIED; and

IT IS FURTHER ORDERED that

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[1]Circuit Judge Robert M. Parker did not participate in this decision.

appellee's motion to dismiss the appeal is GRANTED.

Dennis, Circuit Judge, dissenting:

Whether an action brought pursuant to 42 U.S.C. § 1983 Survives the death of a party is determined by the law of the forum State. *Robertson v. Wegmann,* 436 U.S. 584, 589-90 (1978). Texas Courts have uniformly held that the Texas survival statute is broad Enough to encompass § 1983 claims. *See* Tex. Civ. Prac. & Rem. Code § 71.021; *Upton County v. Brown,* 960 S. W. 2d 808, 817-18 (Tex. Ct. App.-El Paso 1997); *Hamilton v. Rogers,* 573 F. Supp. 452, 454 (S.D. Tex. 1983). Therefore, I would grant the appellant's motion to Substitute parties and deny the appellee's motion to dismiss.

A true Copy
Test

Clerk, U.S. Court of Appeals, Fifth Circuit
By /s/Mary Stewart
Deputy Sep 27 2002

Revised November 15, 2001
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 00-50702

ROBERTO S. VASQUEZ; ET AL,

Plaintiffs,

JESUS DE LA O,

Plaintiff-Appellant

versus

HOUSING AUTHORITY OF THE

CITY OF EL PASO,

Defendant-Appellee.

Appeal from the United States District
Court for the Western District of Texas

November 5, 2001

Before POLITZ and BARKSDALE, Circuit Judges, and FALLON,[1] District Judge.

POLITZ, Circuit Judge:

Jesus De La O appeals an adverse summary judgment in his action challenging the El Paso Housing Authority's enforcement of a trespassing regulation against candidates engaged in door-to-door campaigning. Concluding that the restriction, as applied to nonresident political volunteers, violates the first amendment, we reverse and remand.

BACKGROUND

De La O resides in the Sun Plaza Apartments, a housing unit owned by the Housing Authority of the City of El Paso ("HACEP"). Roberto Vasquez, a candidate for El Paso County Democratic Chair, sought to distribute literature and to engage in door-to-door campaigning at Sherman Oaks, another HACEP development. Vasquez does not reside in any HACEP facility. HACEP informed Vasquez that he could not campaign on any housing authority property, citing two regulations. The first regulation, commonly known as a "trespass after warning" rule, limits access to HACEP property to "residents, members of their households, their guests and visitors, and such other persons who have legitimate

business on the premises, e.g., law enforcement and other governmental personnel, utility service workers, HACEP contractors, and others as authorized by HACEP."[2] Persons refusing to identify themselves or those who cannot prove authority to be on the development premises are to receive a "trespass warning" ordering them to leave or face arrest.

The second regulation, entitled "Notices and Flyers," prohibits the distribution of such materials without prior approval of the Development's Housing Manager. It allows residents to distribute literature only between 9:00 a.m. and 8 p.m. and forbids the placing of leaflets on the doors of residents who do not answer.[3] Taken together, these regulations operate to allow residents to distribute literature, political or otherwise, but prevent nonresidents from doing so. The Director of Housing Management stated in his affidavit that the trespass after warning rule protects tenants in that most persons arrested on the premises are nonresidents.

The De La O and Vasquez action challenges the regulations restricting nonresident access. The trial court issued a Temporary Restraining Order enjoining HACEP from preventing Vasquez and other candidates from campaigning on HACEP's property until a final hearing could be held. That

hearing followed and the parties filed dispositive motions. HACEP moved to dismiss the action and, alternatively, for summary judgment. De La O and Vasquez responded by filing their own motions for summary judgment. The trial court entered final judgment granting HACEP's motion for summary judgment. In its Memorandum Opinion and Order the court found that the housing development was a non-public forum and that the regulations were a reasonable response to relevant safety concerns. De La O appealed, asserting his constitutional right to receive oral and written presentations from political candidates or their representatives.

ANALYSIS

We review a summary judgment *de novo*, affirming if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.[4] The parties do not dispute the facts and ask us to decide the purely legal issue whether the HACEP regulations violate the first amendment. We conclude that the regulations, as applied to political campaigners and their representatives, constitute an unreasonable restriction on De La O's first amendment right to receive political information.

I. Right to Receive Information Protected Under First Amendment

We will address the question of the propriety of a challenged regulation, such as that at bar, if the activity at issue implicates the first amendment. HACEP contends that the present dispute raises no first amendment concerns because De La O, the only remaining appellant, resides in the development and may proceed door-to-door espousing his political views. We are not persuaded; there is more to the inquiry. The first amendment guarantees the unrestricted flow of information into the market place of ideas. This first amendment protection extends not only to those who contribute to the market place of ideas, but necessarily extends to those who seek to benefit from the resultant dialogue. As stated by the Supreme Court:

> The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was ever to triumph over slothful ignorance. This freedom embraces the right to distribute literature, and necessarily protects the right to receive it.[5]

II. Forum Analysis

After finding that the activity at issue implicates the first amendment, "we must determine the level of scrutiny that applies to the regulation of protected speech at issue."[6] The Supreme Court recognizes three different categories of government owned property for purposes of the first amendment: the traditional public forum, the designated public forum, and the nonpublic forum.[7] Traditional public fora include "those places which 'by long tradition or by government fiat have been devoted to assembly and debate,'" such as public streets and parks.[8] Designated public fora encompass those places or channels of communication assigned by the government "for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects."[9] Finally, nonpublic fora consist of those places "which [are] not by tradition or designation a forum for public communication."[10]

We agree with the district court that the HACEP developments fall within the category of nonpublic fora.[11] Residency is limited to those who meet the financial qualifications and the developments lack public streets and parks. In addition, although the residents use the housing complex for myriad everyday life activities,

including the discourse on ideas and the discussion of any topic they desire, the government did not create HACEP nor its developments for the purpose of providing a meeting place for the public to exchange ideas. Rather, the purpose of the HACEP development activity is to provide affordable housing to low income citizens who reside in El Paso. This necessarily mandates a finding that the HACEP developments differ in character from the areas previously categorized by the Court as designated public fora.[12]

We recognize that HACEP shares many similarities with the government town at issue in Tucker v. State of Texas,[13] where the Court held that a village owned by the United States and designed to provide housing for persons engaged in National Defense activities could not ban religious activities within its boundaries. Unlike Tucker, however, HACEP operates only a small web of housing complexes within a large urban area, it does not control every building and walkway in the city of El Paso. A more telling comparison is the military base at issue in Greer v. Spock.[14] The base permitted free civilian access to certain unrestricted areas, however, "[t]he presence of sidewalks and streets within the base did not require a finding that it was a public forum."[15] Characterizing HACEP as a public forum simply because of its streets

and sidewalks, as appellant urges, would be inconsistent with our understanding of the Court's forum analysis jurisprudence. As the Court clearly has noted: "The mere physical characteristics of the property cannot dictate forum analysis."[16] The developments operated by HACEP, as we view them, fall within the category of nonpublic fora.

III. Constitutionality of the Housing Authority Regulations

The determination that the HACEP developments are nonpublic fora does not end our inquiry. We must evaluate the regulations at issue under the standard established by the Court for restrictions on speech in nonpublic fora. The government may regulate expressive activities in a nonpublic forum "as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."[17] We recognize that the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government."[18] An equally commanding principle, however, is that "[t]he Government, even when acting in its proprietary capacity, does not enjoy absolute freedom from First Amendment constraints."[19] Applying the

aforementioned standard to the present dispute, we conclude that the trespass after warning statute, as applied to political candidates, constitutes an unreasonable restriction on the residents' first amendment rights.

A. Viewpoint Neutrality

We agree with the district court that Rules D2 and D5 are viewpoint neutral because they apply to all nonresidents who seek to go door-to-door distributing literature. HACEP proscribes door-to-door campaigning regardless of party affiliation or the viewpoint espoused by the nonresident. Accordingly, the regulations are content-neutral in our constitutional evaluation.

B. Reasonableness

With due pause and after careful consideration we disagree with trial court that Rules D2 and D5 constitute reasonable regulations when applied to political candidates and their campaign volunteers. The trespass regulation, as applied to political campaigning, strikes at the very core of our democratic system. "Mere legislative preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to

justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions."[20] For many individuals, door-to-door political volunteers provide the main or only link to the election process, especially with respect to local elections where candidates may lack the resources for extensive media campaigns. In recognizing the importance of political canvassing, the Supreme Court stated: "Of course, as every person acquainted with political life knows, door to door campaigning is one of the most accepted techniques of seeking popular support, while the circulation of nominating papers would be greatly handicapped if they could not be taken to the citizens in their homes. Door to door distribution of circulars is essential to the poorly financed causes of little people."[21] We do not reject HACEP's concern that non-residents commit the majority of crimes on development property, nor its belief that combating crime is a legitimate purpose for the trespass after warning regulation. We conclude, however, that the manner in which HACEP seeks to accomplish its goal of crime prevention is unreasonable under the circumstances herein presented.

As noted by the Court, "consideration of a forum's special attributes is relevant to the constitutionality of a regulation since the significance of the governmental interest

must be assessed in light of the characteristic nature and function of the particular forum involved."[22] HACEP operates housing developments, where people walk to and from their residences, talk with their neighbors, and generally conduct themselves like individuals in any other neighborhood in El Paso. As such, the citizens who reside in the HACEP developments deserve access to political information in the same manner as other citizens of El Paso. HACEP apparently acknowledges the importance of allowing political discourse because it concedes that De La O, a resident, can walk door-to-door expressing his views and distributing literature in support of any candidate. The sole qualification, compliance with the strictures in Rule D5,[23] poses a requirement that, if placed upon nonresident political candidates or volunteers, likely would remedy any safety concerns caused by unknown individuals campaigning at inappropriate hours.

We note with some focus that the record reflects that HACEP does not ban all nonresidents, as the trespass regulation does not apply to certain individuals. These include members' guests and visitors, and "such other persons who have legitimate business on the premises, e.g., law enforcement and other government personnel, utility service workers, HACEP

contractors, and others as authorized by HACEP." That the regulation lists certain groups as "examples" indicates to us that HACEP contemplates the existence of other groups, unmentioned in the regulation, who fall under the category of individuals with "legitimate business on the premises." We are persuaded beyond peradventure that the wholesale exclusion of political candidates and their volunteers from this category unreasonably and unnecessarily interferes with what may well be the primary connection between many of HACEP's residents and the democratic process.[24]

Finally, "[i]n considering legislation which thus limits the dissemination of knowledge, we must 'be astute to examine the effect of the challenged legislation'. . .."[25] The effect of the trespass regulation, as applied in the matter before us, is to isolate a significant portion of the El Paso community from one of the most time-honored and effective means of political discourse. Although HACEP's outright ban on door-to-door campaigning by nonresidents is unreasonable, requiring political campaigners to seek the same authorization as other individuals that have "legitimate business on the premises" would be reasonable in light of HACEP's goals of preventing crime by nonresidents. HACEP's Housing Managers need merely check to

ensure that the campaign volunteer's credentials are valid. Such identification might properly be denied if the volunteer reasonably lacked sufficient credentials. This would provide an adequate balance between protecting residents from dangerous imposters and promoting political discourse: "While door to door distributors of literature may be either a nuisance or a blind for criminal activities, they may also be useful members of society engaged in the dissemination of ideas in accordance with the best tradition of free discussion."[26]

We recognize that in Daniel v. City of Tampa, the Eleventh Circuit reached an opposite conclusion with respect to a nearly identical statute, Florida Statute Chapter 810.09.[27] Our brethren concluded that Florida's housing authority complexes are nonpublic fora and that "enforcement of the statute is a reasonable means of combating the rampant drug and crime problems within the Housing Authority property."[28] While not unmindful of the conflict created by our differing interpretation of the first amendment issues implicated herein, the nature of the injustice inflicted by enforcement of the regulation in this case warrants reversal of the summary judgment before us. While not a public forum, Sun Plaza houses citizens of El Paso who

deserve access to political information and an unfettered role in the democratic process. The values at stake are a precious cornerstone in our nation's political foundation.

"This court has characterized the freedom of speech and that of the press as fundamental personal rights and liberties. The phrase is not an empty one and was not lightly used. It reflects the belief of the framers of the Constitution that exercise of the rights lies at the foundation of free government by free men. It stresses, as do many opinions of this court, the importance of preventing the restriction of enjoyment of these liberties."[29]

IV. Conclusion

The nature of HACEP's developments make an outright ban on door-to-door political campaigning by nonresidents an unreasonable restriction on the freedoms guaranteed by the first amendment. For the reasons assigned, we REVERSE and REMAND for further proceedings not inconsistent herewith.

RHESA HAWKINS BARKSDALE, Circuit Judge, dissenting:

I agree with the majority that resident Jesus De La O has standing to challenge the

regulations at issue and that Sun Plaza Apartments, owned by the Housing Authority of the City of El Paso (HACEP), is not a public forum. However, I must dissent from the majority's holding that those regulations are not reasonable in the light of the purpose of the HACEP properties - providing affordable housing to its low income, primarily elderly residents.

I.

Jesus De La O, a Sun Plaza Apartments resident, challenges two regulations -- Rules D2 and D5 -- promulgated by HACEP: "Trespass After Warning" (Rule D2) and "Notices and Flyers" (Rule D5). The "Trespass After Warning" regulation limits access to HACEP property to lawful residents, invited guests, and other persons with legitimate business on the property, such as law enforcement and government personnel, utility workers, HACEP contractors, and individuals authorized by HACEP. Housing Authority of the City of El Paso, Tex., Community and Residential Rules for Public Housing and Section 8 New Construction Program, Rule D2 (19 Aug. 1998). Persons who refuse to identify themselves, or who cannot prove authorization to be on the premises, receive a "trespass warning", requiring them to leave the property or be arrested. ***Id.***

The "Notices and Flyers" regulation limits distribution of literature by residents of HACEP properties to specified hours and prohibits leaving flyers "in plain view on a resident's door" when a resident does not answer. ***Id.***, Rule D5 (as amended 1 Feb. 2000).

The HACEP Director of Housing Management stated that the purpose of Rules D2 and D5 is the protection and safety of tenants, because: most arrests on HACEP properties involve nonresidents; nonresidents sell drugs on HACEP property; and large numbers of undocumented aliens pass through HACEP property. At Sun Plaza Apartments in particular, nonresident walk-through is especially high, and the Immigration and Naturalization Service operates a surveillance station there to combat illegal immigration. Also, because Sun Plaza Apartments is primarily inhabited by elderly residents, many in the complex are fearful of door-to-door solicitation. Furthermore, the Director explained to staff and De La O that leaving a flyer at an unanswered door would advertise to thieves that no one is at, or in, that apartment.

II.

As the majority notes, when First Amendment claims are implicated, there are

three types of government-owned property under the Supreme Court's "forum analysis": the traditional public forum, the designated forum, and the nonpublic forum. *See* ***United States v. Kokinda***, 497 U.S. 720, 726-27 (1990). And, as the majority holds, Sun Plaza Apartments and other HACEP properties can be nothing other than nonpublic fora. ***Maj. Op.*** at 6. Consequently, "the state may reserve the forum for its intended purposes ... as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view". ***Perry Educ. Ass'n v. Perry Local Educators' Ass'n***, 460 U.S. 37, 46 (1983); *see also* ***Cornelius v. NAACP Defense & Educ. Fund, Inc.***, 473 U.S. 788, 800 (1985); ***Hobbs v. Hawkins***, 968 F.2d 471, 481 (5th Cir. 1992).

As the majority holds, Rules D2 and D5 are viewpoint neutral as written and as applied. ***Maj. Op.*** at 9. Considering the uncontradicted evidence concerning HACEP's purpose for its properties, I would hold, however, that the regulations are "reasonable in light of the purpose served by the forum". ***Hobbs***, 968 F.2d at 481.

While the majority acknowledges the nonpublic forum reasonableness test, it ignores the Supreme Court's explanation of how to evaluate the reasonableness of a

regulation. "The Government's decision to restrict access to a nonpublic forum need only be *reasonable*; it need not be the *most reasonable* or the *only reasonable limitation.*" ***Cornelius***, 473 U.S. at 808 (emphasis in original and emphasis added). The majority incorrectly concludes that the regulations are not reasonable because there are other approaches that HACEP could have taken.[30]

In contrast to the majority's method of finding another approach that it deems reasonable, we should accept the uncontested explanation of the HACEP Director of Housing Management that the "Trespass After Warning" regulation (Rule D2) is a reasonable response to the problem of rampant crime in low-income housing developments. *See* ***Daniel v. City of Tampa, Florida***, 38 F.3d 546, 550 (11th Cir. 1994); *see* also ***Williams v. Nagel***, 643 N.E.2d 816, 817-18 (Ill. 1994), *cert. denied*, 514 U.S. 1064 (1995) (police-issued "barred notice" authorized complexes to compile "no trespass" lists); ***People v. Kojac***, 671 N.Y.S.2d 949, 950 (N.Y. Sup. Ct. 1998) (building management authorized police to arrest those on the premises without legitimate business); ***State v. Newell***, 639 N.E.2d 513, 514 (Ohio Ct. App. 1994) (off-duty police officers authorized to issue trespass warnings for public housing);

City of Dayton v. Williams, 1994 WL 37263 (Ohio Ct. App. 1994) (public housing authority policy allowed police to issue trespass notices and arrest those who previously received warnings). Rule D2 allows residents to have guests and visitors on the premises; therefore, De La O may invite political campaigners to his apartment without restriction. The regulation merely provides HACEP with a way to deal with *unauthorized* individuals on the premises.

In fact, the majority ignores its own forum analysis. In deciding the HACEP properties are nonpublic, the majority correctly concludes that the *purpose* of the properties is *not* to provide a meeting place for the exchange of ideas but rather to provide affordable housing. ***Maj. Op.*** at 6. Once the majority reaches the reasonableness inquiry, however, it focuses on the importance of communication and access to information, which ignores that the reasonableness of the regulation should be judged by reference to the purpose of the forum.

Furthermore, while no one would disagree with the majority's most commendable interest in promoting the democratic process, another factor that is integral to the evaluation of the reasonableness of a regulation is whether alternative channels

of communication exist. ***Cornelius***, 473 U.S. at 809 (direct mail and in-person solicitation outside the forum as alternatives); ***Perry Educ. Ass'n***, 460 U.S. at 53 (bulletin boards, meeting facilities, and United States mail available). The HACEP Director of Public Housing's uncontradicted affidavit explained that all HACEP properties are adjacent to public streets and sidewalks, and that De La O's complex, Sun Plaza Apartments, "is completely bounded by city streets and sidewalks" open to the public. De La O and others are free to hear the messages of various political candidates outside their complex and decide whether to invite them inside the development in compliance with HACEP's safety regulation. Also (and obviously), there is no regulation preventing a direct mail campaign to HACEP residents.

Without addressing the readily available alternative channels of communication,[31] the majority chooses to focus on the utility of political canvassing in local elections, ignoring further guidance by the Supreme Court: "The First Amendment does not demand unrestricted access to a nonpublic forum merely because use of that forum may be the most efficient means of delivering the speaker's message". ***Cornelius***, 473 U.S. 809; ***United States Postal Serv. v. Council of Greenburgh Civic Ass'ns,*** 453 U.S. 114, 129 (1981).

While door-to-door canvassing may be a more efficient means for candidates to communicate their political views, the regulations, of course, do not prevent them from speaking to residents outside the HACEP properties on the public streets and sidewalks.

The majority also mistakenly focuses on the distinction between those allowed on the premises and those not. However, the Supreme Court has spoken to this point as well:

Implicit in the concept of the nonpublic forum is the right to make distinctions in access on the basis of subject matter and speaker identity. These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property.

Perry Educ. Ass'n, 460 U.S. at 49. Consequently, it is entirely appropriate for HACEP to make distinctions based on the identity of the speaker: residents, invited guests, and those with official business are allowed to remain, while others, such as political canvassers, uninvited solicitors, illegal aliens, and those intent on criminal activity, are required to leave.

III.

In contrast to the majority, I believe that the approach by the Eleventh Circuit seven years ago in addressing a nearly identical statute is correct. *See* ***Daniel***, 38 F.3d at 550-51. As in ***Daniel***, I would affirm the summary judgment. The two Rules at issue are reasonable because the purpose of the HACEP properties is to provide affordable housing and not a vehicle for political canvassing. Accordingly, I respectfully dissent.

1. Honorable Eldon E. Fallon, United States District Judge for the Eastern District of Louisiana, sitting by designation.

2. Housing Authority of the City of El Paso, Community and Resident Rules for Public Housing and Section 8 New Construction Program, Rule D2.

3. Id., Rule D5.

4. Harris v. Rhodes, 94 F.3d 196 (5th Cir. 1996).

5. Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (citations omitted).

6. United States v. Kokinda, 497 U.S. 720, 725 (1990) (plurality opinion).

7. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37 (1983).

8. Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 802 (1985) (quoting Perry, 460 U.S. at 45)).

9. Id. (citing Perry, 460 U.S. at 45-46 and n.7).

10. Perry, 460 U.S. at 46.

11. See also Daniel v. City of Tampa, 38 F.3d 546 (11th Cir. 1994) (finding that Florida's housing complexes are nonpublic fora).

12. See, e.g., Widmar v. Vincent, 454 U.S. 263 (1981) (finding university facilities a designated public forum with first amendment rights of equal access to students); City of Madison Joint Sch. Dist. No. 8 v. Wis. Employment Relations Comm'n, 429 U.S. 167 (1976) (finding school board meeting a designated public forum with respect to issues relating to operation of district's public schools).

13. 326 U.S. 517 (1946).

14. 424 U.S. 828 (1976).

15. United States v. Kokinda, 497 U.S. 720, 727 (1990) (citing Greer v. Spock, 424 U.S. 828, 835-37 (1976)).

16. Id.

17. Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

18. United States Postal Serv. v. Greenburgh Civic Ass'ns, 453 U.S. 114, 129 (1981).

19. Kokinda, 497 U.S. at 725.

20. Schneider v. State (City of Irvington), 308 U.S. 147, 161 (1943).

21. Martin v. City of Struthers, 319 U.S. 141, 146 (citations omitted).

22. Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 650-51 (1981).

23. Specifically, getting prior permission to distribute any notices or flyers from the Housing Manager at Sun Plaza and going door-to-door between the hours of 9 a.m. and 8 p.m.

24. We note that HACEP uses a system, the specifics of which are not contained in the record, by which law enforcement officers make the determination of who to "warn" after asking for identification. The government personnel, utility service workers, etc., who qualify as having

"legitimate business on the premises" must carry some type of identification to satisfy the officers that their presence on HACEP property is warranted. We can think of no reasonable explanation for barring political candidates from obtaining similar identification. If the checking of an individual's credentials by law enforcement officials serves as sufficient protection when allowing government personnel, contractors and others on to the premises, the same safeguards should provide ample security when dealing with political candidates and their representatives.

25. Martin, 319 U.S. at 144 (quoting Schneider, 308 U.S. at 161 (1939)).

26. Id. at 145 (discussing crime prevention in context of citywide regulation prohibiting door-to-door leafleting).

27. 38 F.3d 546 (11th Cir. 1994).

28. Id. at 550.

29. Schneider v. State (City of Irvington), 308 U.S. 147, 161 (1939).

30. The majority suggests that political canvassers could obtain identification. Apart from ignoring that most of the individuals with "legitimate business on the premises" have a specific job that does not

involve walking from door-to-door throughout a HACEP complex, the majority also does not address the myriad problems that would arise from this approach. For example, are there limits on the number of ID badges provided? How should HACEP determine who is a legitimate candidate? Would this authorization extend to political organizations and interest groups?

31. Instead, the majority quotes from ***Martin v. City of Struthers, Ohio***, 319 U.S. 141 (1943), a case decided prior to the Supreme Court's "forum analysis" approach and holding unconstitutional a city-wide ban on door-to-door solicitation at residential homes.

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CLERK UNITED DISTRICT
COUNTY WESTERN DISTRICT
OF TEXAS
BY: /S/JRC
DEPUTY

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
EL PASO DIVISION

ROBERTO S.	§
VASQUEZ,	§
et.al.	§
	§
	§EP-00-CA-089-DB
VS.	§
	§
HOUSING AUTHORITY	§
OF THE CITY OF EL	§
EL PSO	§

MEMORANDUMOPINION AND ORDER

On this day, the Court considered Defendant the Housing Authority of the City of El Paso's("HACEP") "Motion to Dismiss and Motion for Summary Judgment" and Plaintiffs Robert S. Vasquez ("Vasquez") and Jesus De La O's ("De La O") (Collectively, "Plaintiffs") "Motion for Summary Judgment and Brief in Support," filed on April13 and 24, 2000, respectively, in the above-

captioned cause. On April 24, 2000, Plaintiffs filed their "Response to the Motion to Dismiss." Plaintiffs filed their "Supplemental Brief in Support of Plaintiff's [sic] Motion for Summary Judgment and Against Defendant's Motion to Dismiss and Summary Judgment" on May 3, 2000. After due consideration the Court is of the opinion HACEP's Motion should be granted and Plaintiff's Motion denied, for the reasons that follow.

Facts & Procedural History

HACEP is a housing authority which maintains various government-owed housing complexes for use by eligible low income El Paso, Texas, residents. De La O is a resident of El Paso and a tenant of one of HACEP's complexes, the Sun Plaza Apartments ("Sun Plaza"). At the time of this cause was commenced, Vasquez, who does not reside in a HACEP complex, was a candidate for the El Paso County Democratic Chair. Early voting and the election for that office was scheduled for April 3and 11, 2002, respectively.

On March 28, 2000, in furtherance of his candidacy, Vasquez allegedly requested permission from HACEP to campaign door-to-door and distribute campaign materials to residents living in the Sherman Oaks

Housing Projects ("Sherman Oaks"),[1] a complex maintained by HACEP. Vasquez avers that at the time, HACEP representatives denied Vasquez permission to campaign door-to-door and advised him that the Sherman Oaks, like other HACEP properties is governed by Rules D.2 and D.5 contained in the "Housing Authority of the City of El Paso Community and Resident Rules for Public Housing Program and Section 8 New Construction Program," which limits access by non-residents to HACEP's complexes. [2]

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[1]All HACEP complexes are adjacent to city-owned streets and sidewalks. Some HACEP complexes, like Sherman Oaks, have city-owned streets and sidewalks within them.

[2] Rule D.2, which the Parties refer to as the "trespassing after warning" rule, provides as follows:

> Trespassing. The development premises are for the exclusive use and enjoyment of the residents, members of their households, their guests and visitors, and such other persons who have legitimate business on the premises, e.g., law enforcement and other governmental personnel, utility service workers, HACEP contractors, and others authorized by HACEP. All other persons will be regarded as trespassers subject to prosecution as allowed by state or municipal ordinance.
>
> Any person who desires access to any development premises and any person found on the walks, ways, playgrounds, parking lots, drives and other common areas of the development premises will be required by law

(Continued....)

Consequently, on March 30, 2000, Plaintiffs filed their Complaint and Motion for Temporary Restraining Order, arguing that Rule D.2 and D.5

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[2] (continued....)
by any law enforcement or HACEP's personnel to identify himself or herself and to prove authority to be on the development premises. Any person who refuses to provide personal identification or cannot show authority to be on the development premises will receive a "trespassing warning" ordering the person to leave the development premises or be subject to arrest and prosecution to the extent permitted by state law or municipal ordinance.

Any person observed by law enforcement or HACEP personnel violating any HACEP rule, or federal, state or municipal law, regulation, or ordinance will be ordered by law enforcement or HACEP personnel to leave the development premises.

Rule D.5 ("door-to-door solicitation rule"), provides as follows:

Notices and Flyers. HACEP does not allow door-to-door sales. If a resident desires to distribute notices or flyers in his development, the resident must obtain advance approval of the Development's Housing Manager and provide the Housing Manager with a coy of the proposed notice or flyer. A resident may not distribute a notice or flyers before 9:00 a.m. or after 8:00 p.m. Under no circumstances will a notice or flyer be left in plain view on a resident's door if a resident of the unit is not a home or declines to answer the door. A resident distributing

(continued....)

violates their rights under the "[f]irst, fourth, fifth and fourteenth amendments to the United States Constitution, " and "42 U.S.C.§§ 1981, 1982, 1983, 1984, and 1988." In essence, Vasquez argues that HACEP's rules operates as a ban on his First Amendment right to campaign door-to-door on HACEP property and to distribute campaign literature to its residents. De La O maintains that the rules violate his right to receive such campaign information from candidates such as Vasquez and, in turn, to "express his views to those candidates." Plaintiff also maintains that Rules D.2 and D.5 are overboard. Next, Plaintiffs aver that Rules D.2. and D.5 violate their rights of equal protection under the law. Finally, De La O argues that HACEP RuleD.1[3] violates

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(continued ...)

such flyers or notices must do nothing to allow the flyers or notice to become liter or which would disrupt the peaceful use and enjoyment of the other residents in the development or the residents' use of common areas At this point, it also is worthy to note that HACEP has presented uncontradicted summary judgment evidence in the form of affidavit testimony by one Ned Berman, HACEP's Director of Housing Management, which establishes that the purpose of Rule D.2 and D.5 are for the protection and safety of HACEP's tenants, many of which are elderly residents and are frightened by door-to-door solicitors due to the fact that majority of those arrested on HACEP property are non-residents engaged in narcotics distribution. Additionally, Berman's uncontradicted testimony reveals that the United States Immigration and

(continued. . .)

his "rights of free speech" and denies him the right "to the fair use of his leasehold." Plaintiff seeks attorney's fees and costs, and a permanent injunction barring the enforcement of these rules at issue.

On March31, 2000, the Court issued a

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[3](continued . . . .)

Naturalization Service operates a surveillance station in at least one of its complexes, the Sun Plaza, because of the large number of undocumented aliens who pass through that complex.

[3] Rule D.1 provides as follows:Parking. Residents will park their motor vehicles in parking areas designated by HACEP. Residents may not park motor vehicles on sidewalks or lawn areas. Residents may not keep inoperable or unlicensed vehicles on the premises. Residents will pay fines or charges incurred by HACEP for removing improperly parked or unregistered motor vehicles. Residents may not underake major repairs on any motor vehicles on the premises. Oil spills in the parking area are to be cleaned immediately by the responsible resident.

Regarding De La O's attack on Rule D.1, the Court notes that "[a] section 1983 complaint must state specific facts, not simply legal and constitutional conclusions." *See, e.g. Fee v. Herndon*, 900 F.2d 804, 807 (5th Cir. 1990). Here, Plaintiffs' Complaint alleges no facts, nor can the Court contemplate a set of facts, to support De La O's contention the Rule D.1

(continued. . .)

Temporary Restraining Order in this cause, enjoining HACEP from preventing Vasquez and other candidates for political office from campaigning on HACEP's property until a final hearing was held on the matter.

On April 7, 2000, the Court held a hearing on this cause.

The Parties' instant Motions followed.

Standard on Motion for Summary Judgment

To the extent that the Court goes beyond the original pleadings in this cause, the Court construes the instant Motions as

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[3](continued . . . .)

violates his free speech rights and denies him the "fair use of his leasehold." Thus, The Court is of the opinion Defendant is entitled to Judgment as a matter of law as to that claim.

Also, in their Brief in Support of Their Motion for Summary Judgment, Plaintiffs argue that Rule D.5 deprives them of a "property and liberty right without due process," and that Plaintiffs are entitled to judgment as a mater of law as to the claim. A careful reading of Plaintiffs' Complaint reveals, however, that Plaintiffs do not allege a due process of claim. Rather, most, if not all, of the allegations contained in Plaintiff's Complaint are directed to Plaintiffs' First Amendment claims. Thus, the court does not address any alleged due process violations or Plaintiffs' arguments thereto.

motions for summary judgment pursuant to Rule 56, because the resulting conversion facilitates disposition of this action. *See* 5A Charles A. Wright & Arthur R. Miller. Federal Practice and Procedure § 1366 (2d ed. 1990 & Supp.2000).

Summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact ant that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The party that moves for summary judgment bears the initial burden of identifying those portions of the pleadings and discovery on file, together with any affidavits, which it believes demonstrate the absence of a genuine issue of material fact. *See, e.g.,Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 2553, 91 l.ed.265 (1986). "If the moving party fails to meet this burden, the motion must be denied, regardless of the nonmovant's response." *Tubacex, Inc. v. M/V Risan,* 45 F.3d 951, 954 (5th Cir. 1995). If the movant does meet this burden, however, the nonmovement must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial. *See, e.g., Celotex,* 477 U.S. at 324, 106 S.Ct. at 2553. "If the nonmovant fails

to meet this burden, then summary judgment is appropriate." *Tubacex*, 45 F.3d at 954.

When making a determination under Rule 56, factual questions and inferences are viewed in a light most favorable to the nonmovant. *See Lemelle v. Univeral Mfg. Corp.*, 18 F.3d 1268, 1272 (5th Cir. 1994). The party opposing a motion supported by evidence cannot discharge this burden by alleging mere legal conclusions. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49, 106 s.Ct.2505, 2510-11, 91 L.Ed.2d 202 (1986). Instead, the party must present affirmative evidence in order to defeat a properly supported motion for summary judgment. *See id.*

Discussion

As previously indicated, Plaintiffs challenge Rule D.2 and D.5 under the "[f]irst, fourth, fifth and fourteenth amendments to the United States Constitution" and "42 U.S.C. §§ 1981, 1982, 1983, 1984, and 1988." Before addressing Plaintiffs' claim, however, the Court begins by expressing its exasperation with the briefing by the Parties, which contains more than fair share of typographical errors, bold assertions of law without citation to supporting authority, and which often times cites a correct

assertion of law, but for the wrong proposition.

Additionally, The Court notes that many of the statutes and constitutional amendments relied upon by Plaintiffs are clearly inapplicable to the facts which they posit in their Complaint. With that in mind, the Court now proceeds to addresses the Parties' arguments.

1. Fourth Amendment and 42 U.S.C. §§ 1981, 1982, 1984, 1988

With respect to Plaintiffs' claim for relief predicated upon the Fourth Amendment to the United States Constitution, the Court notes that the Fourth Amendment governs "[t]he right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and

seizures" by governmental actors, which a review of the facts alleged in Plaintiffs' Complaint clearly reveals is not implicated in this cause.

Regarding Plaintiffs' claims for relief under 42 U.S.C. §§ 1981 and 1982, those statutes provide a cause of action only for racial discrimination, which a review of Plaintiffs' Complaint again reveals they do not allege. *See Runyon v. McCrary*, 427 U.S. 160, 168, 96 S.Ct. 2586, 2593, 49

L.ED.2d 415 (1976)(§ 1981); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 413, 88 S.Ct. 2186, 2189, 20 L.Ed.2d 1189 (1968)(§1982). Thus, the Court finds that HACEP is entitled to judgment as a matter of law as to all claims asserted in Plaintiffs' Complaint which are predicated upon the Fourth Amendment and 42 U.S.C. §§ 1981 and 1982.

As to Plaintiffs' claim for relief under 42 U.S.C. §§ 1984, the Court points out that § 1984 has long been repealed. The Historical Note contained under § 1981 reveals that sections1 and 2 thereof were declared unconstitutional in *United States v. Singleton* 109 U.S. 3, 25, 3 S.Ct. 18, 32, 27 L.Ed. 835 (1883), and sections 3 and 4 thereof were repealed in 1948. Thus, the Court finds that HACEP also is entitled to judgment as a matter of law as to any claim asserted by Plaintiffs which is predicated 42

U.S.C. §§ 1981 and 1982.

As to Plaintiffs' claim for relief under 42 U.S. 3, 25, 3 S.Ct.18, 32 27 L.Ed.835 (1883), and section 3 and 4 thereof were repealed in 1948. Thus, the Court finds that HACEP also is entitled to judgment as a matter of law as to any claim asserted by Plaintiffs which is predicted upon 42 U.S.C. § 1984.

Finally, 42 U.S.C.§ 1988 does not create a

Every person who, under color of any statue, ordinance, regulation, custom, or usage, of any State. . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . .

"Rather that creating substantive rights, § 1983 simply provides a remedy for the rights that it designates." *Johnston v. Harris Country Flood Control Dist.,* 869 F.2d 1565, 1573 (5th Cir. 1989). "Thus, an underlying constitutional or statutory violation is a predicate to liability under § 1983, " *Id.*

Here, as previously indicated, Plaintiffs argue Rules D.2 and D.5 tread upon their First Amendment rights and deny them equal protection under the law. HACEP, y contrast, argues that their rules pass constitutional muster in all respects. The Court agrees with HACEP.

In general, the "First Amendment does not guarantee access to property simply because it is owned or controlled by the government." *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns,* 453 U.S. 114, 129, 101 S.Ct. 2676, 2685, 69 L.Ed.2d

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517 (1981). Rather, "[t]he existence of a right of access to public property and the standard by which limitations upon such a right must be evaluated differ depending on the character of the property at issue." *Perry Educ. Ass'n v. Perry Local Educators' Ass'n,* 460 U.S. 37, 44, 103 S.Ct. 948, 954, 74 L.Ed.3d 794 (1983).

In *Perry*, the Supreme Court announced a "forum-based" approach to determine the

constitutionality of governmental restrictions imposed on the use of its property. There, "the Court identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum.: *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.* 473 U.S. 788, 802, 105 S.Ct.3439, 3449, 87 L.Ed.2d 567 (1985). "Traditional public for a are those places which 'by long tradition or by government fiat have been devoted to assembly and debate, such as public streets and parks." *Id* (quoting *Perry,* 460 U.S. at 45, 103 S.Ct at 954.) "In addition to traditional public for a, a public forum may be created by government designation of a place or channel of communication for use by the public at large for assembly and speech, for use by certain speakers, or for the discussion of certain subjects." *Id.* (citing *Perry,* 460 U.S. at 45-46 and n.7, 103 S.Ct. at 955 and n.7). Finally, here is the

nonpublic forum, the residual class of government-owned property, to which the First Amendment does not guarantee access. See *Perry*, 460 U.S. at 46, 103 S.Ct. at 955; *Doe v. Santa Fe Indep. Sch. Dist.* 168 F.3Ed 806, 819 (5th Cir. 1999). Government restriction of speech in a traditional or designated public forum are subject to a strict scrutiny analysis, whereby such restrictions must be narrowly tailored to serve a compelling governmental interest. *See Hobbs v. Hawkins,* 968 F.2d 471, 481

(5th Cir. 1992); *Cornelius*, 473 U.S. at 800, 105 S.Ct. at 3448. By contrast, governmental restrictions on speech, even a complete prohibition of speech, in a non-public forum survive as long as they are reasonable in light of the purpose served by the forum and are viewpoint-neutral. *See Hobbs*, 968 F.2d at 481; *see also Cornelius*, 473 U.S. at 800, 105 S.Ct. at 3448; *Perry*, 460 U.S. at 46, 103 S.Ct. at 955.

In *Daniel v. City of Tampa,Fla.*, 38 F.3d 546 (11th Cir. 1994), the United States Court of Appeals for the Eleventh Circuit addressed the constitutionality of Fla.Stat.ch.8 10.09, a statute nearly identical to Rule D.5 here. In so doing, the *Daniel* court concluded, among other things and like other courts which have considered the matter, the Florida's housing authority complexes, like HACEP's complexes here, are non-public forums. *See id.* at 550; *De La O v. Housing Authority of El Paso*, EP-98-CA-52-H, slip op. at 3 (W.D.Tex. Feb. 11,1999) (finding HACEP's Sun Plaza complex non-public forum). Following their leads, the Court pauses only momentarily to conclude that HACEP's complexes are "non-public forums." The purpose of HACEP is to provide affordable housing to low income El Pasoans, not to provide non-residents with a place to disseminate ideas. This This is evidenced by the fact that, by all accounts, HACEP limits access to its property to residents, their invited guests, and those

conducting official business. Thus, HACEP's restrictions on access to its property pass constitutional muster as long as those restrictions are viewpoint-neutral and reasonable. *See, e.g., Hobbs,* 968 F.2d at 481.
The Court finds HACEP's rules clear both of these hurdles.

First, Vasquez has presented absolutely no evidence to suggest that he was, or any non-resident has been, denied access to HACEP's complexes because HACEP disagreed with his political message. Nor has Vasquez presented any evidence to suggest Rules D.2 and D.5 were enacted, or are being applied, to filter those messages with which HACEP disagrees. Thus, the Court concludes HACEP's rules are content-neutral.

With respect to the reasonableness of Rules D.2 and D.5, the Court finds that such rules are a reasonable means of combating the above-mentioned criminal activity that, according to Defendant's uncontradicted summary judgment evidence, occurs on its property by non-residents. The Court further notes that Vasquez has access to the city-owned streets and sidewalks which are adjacent to HACEP's complexes, and in some instances, are contained within those complexes, to disseminate his political message. *See Daniel,* 38 F.3d at 550 (finding unlimited

933 F.2d 284, 287 (5th Cir. 1991) (quoting *Village of Hoffman Estates v. Flipside,* 455 U.S. 489, 494, 102 S.Ct. 1186, 1191, 71 L.Ed.2d 362 (1982)). The overbreadth analysis primarily has been used to invalidate governmental restrictions affecting freedoms of expression and association protected by the First Amendment. *See id.* Because Plaintiffs have failed to demonstrate that Rules D.2 and D.5 tread upon their First Amendment rights, that is, that the rules reach a substantial amount of constitutionally protected conduct, the Court finds Plaintiffs' overbreadth challenge likewise fails. The Court now addresses Plaintiffs' equal protection claim.

Next, Plaintiffs argue that Rules D.2 and D.5 violate their equal protection rights because "Defendant has created two classes: persons who wish to campaign who reside in [HACEP] complexes, and those who do not reside." In an attempt to support its claim that its rules do not violate Plaintiffs' equal protection rights, HACEP argues that, as long as their rules "provide[ ]citizens with clear notice of what is prohibited, and enforcement of the policy leaves little to the discretion of the enforcer, equal protection rights are not taken." HACEP is mistaken, and the Court finds

overbreadth challenge likewise fails. The Court now addresses Plaintiffs' equal protection claim.

Next, Plaintiffs argue that Rules D.2 and D.5 violate their equal protection rights because "Defendant has created two classes: persons who wish to campaign who reside in [HACEP] complexes, and those who do not reside." In an attempt to support its claim that its rules do not violate Plaintiffs' equal protection rights, HACEP argues that, as long as their rules "provide[ ]citizens with clear notice of what is prohibited, and enforcement of the policy leaves little to the discretion of the enforcer, equal protection rights are not taken." HACEP is mistaken, and the Court finds HACEP's proposition of law better suited to an analysis of whether a governmental Regulation is constitutionally void for vagueness. *See, e.g., Kolender v. Lawson,* 461 U.S. 352, 357, 103 S.Ct. 1855, 1858, 75 L.Ed.2d 903 (1983) ([T]he void for vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement."). Instead, the Court finds the more appropriate framework applicable to analyzing Plaintiffs' equal protection claim to be that set forth in *New Orleans v. Dukes,* 427 U.S. 297, 303, 96 S.Ct. 2513, 2516-17,

49 L.Ed.2d 511(1976), where the Supreme Court stated, "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage, our decisions presume the constitutionality of the statutory discriminations and require only that the classification challenged be rationally related to a legitimate state interest." When fundamental rights or suspect classifications are involved, however, stricter judicial scrutiny is called for. *See id.*

Here, the Court is not persuaded that Plaintiffs have an equal protection claim. Because Rules D.2 and D.5 are not "drawn upon [an] inherently suspect distinction [ ] such as race, religion, or alienage," the are not subject to any heightened equal protection scrutiny. *See id.* Moreover, because the right to canvass door-to-door to solicit campaign support in a non-public forum is not fundamental right per se in the constitutional sense, any alleged classification created by HACEP merely must be rationally related to a legitimate state interest. *See id.* That is to say, HACEP must merely have some minimal justification for treating non-residents differently from residents. As previously indicated, such justification exists because HACEP complexes suffer from criminal activity, the majority of which is committed by non-residents. Because the Court finds

HACEP Rules D.2 and D.5 rationally related to the problem for which they were designed to address, Plaintiffs' equal protection claim fails. Thus, having reviewed the Summary judgment evidence presented and resolve all factual doubts in Plaintiffs' favor, the Court finds no outstanding issues of material fact exist with respect to Plaintiffs' claims and that HACEP is entitled to judgment as a matter of law on those claims.

Accordingly, **IT HEREBY IS ORDERED** that Defendant the Housing Authority of the City of El Paso's "Motion for Summary Judgment" is **GRANTED**.

IT FURTHER IS ORDERED Plaintiffs Robert S. Vasquez and Jesus De La O's "Motion for Summary Judgment" is **DENIED**.

IT FURTHER IS ORDERED that the above-captioned cause is **DISMISSED WITH PREJUDICE**.

IT FINALLY IS ORDERED that the "Temporary Restraining Order" entered in this Cause on March 31, 2000, is **VACATED**.

SIGNED this 13th day of **July, 2000**.

/s/
THE HONORABLE DAVID BRIONES
UNITED STATES DISTRICT JUDGE

42 U.S.C. Sec. 1983

Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and law, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District o of Columbia.

CPRC §71.021. Survival of Cause of Action

(a) A cause of action for personal injury to the health, reputation, or person of an injured person does not abate because of the death of the injured person or because of the death of a person liable for the injury.

(b) A personal injury action survives to and in favor of the heirs, legal representatives, and estate of the injured person. The action survives against the liable person and the person's legal representatives.

(c) The suit may be instituted and prosecuted as if the liable person were alive.

(2)

Supreme Court U.S.
FILED
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No. 02-1276

In The
Supreme Court of the United States

ROSALINA DE LA O, ADMINISTRATRIX
FOR THE ESTATE OF JESUS DE LA O,

Petitioner,

v.

THE HOUSING AUTHORITY OF THE
CITY OF EL PASO, TEXAS,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a civil rights suit for injunctive relief, seeking only nominal damages, survives the death of the plaintiff under the law of Texas.

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TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Housing Authority of the City of El Paso, Texas prays that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS BELOW

Petitioner's appendices set forth the relevant opinions of the courts below. The citation of the trial court opinion and its subsequent history are *Vasquez v. Housing Authority of the City of El Paso*, 103 F. Supp.2d 297 (W.D. Tex. 2000), *rev'd,* 271 F.3d 198 (5th Cir. 2001), *rehearing en banc granted*, 289 F.3d 350 (5th Cir. 2002), *order denying motion to substitute party and granting motion to dismiss appeal as moot*, No. 00-50702 (5th Cir. September 23, 2002).

STATEMENT OF THE CASE

In addition to petitioner's statement of the proceedings below, respondent would show that the Fifth Circuit, prior to *en banc* oral argument, requested letter briefs regarding the survival of civil rights actions. A copy of this letter is annexed hereto as respondent's appendix. Petitioner's statement of the procedural history of the case is essentially correct. Respondent, however, does not agree with the extraneous characterizations of the Housing Authority's regulations as being "capricious and unreasonable," or with

the factual representations about the de la O estate's debts and assets. Petition for Writ of Certiorari at 3.

REASONS FOR DENYING THE PETITION

I.

The Texas Survival Statute Requires Actual Damage to the Decedent's Property or Person

The survival of actions brought under the Civil Rights Act of 1871, 42 U.S.C. §1983, is determined by the law of the forum state. *Robertson v. Wegmann*, 436 U.S. 584, 98 S.Ct. 1991 (1978). The Texas survival statute generally provides that "[a] cause of action for personal injury to the health, reputation, or person of an injured person" survives the death of that person. Tex. Civ. Prac. & Rem. Code §71.021. The statute, however, is not specifically tailored to cover Section 1983 causes of action. *Upton County v. Brown*, 960 S.W.2d 808, 817 (Tex. App. – El Paso 1997, no pet.), *citing Hamilton v. Rogers*, 573 F.Supp. 452, 453-54 (S.D. Tex. 1983).

Although the statute does not expressly cover civil rights actions, the caselaw indicates that in order for a cause of action to survive the death of the claimant, actual damages must be at stake. The suit brought by Roberto Vasquez and Jesus de la O, while asserting generic damages, did not relate to their "health, reputation or person," but was directed to injunctive relief. Plaintiffs' Complaint, Fifth Circuit Record Excerpts, Tab 27. De la O has never claimed physical or mental injury, other than in a generalized fashion. The petition for writ of certiorari, as with his prior pleadings, is not specific; it speaks of "potential recovery of damages" at 3, "any damages related to his injury

from breach of constitutional rights" at 5, and the statutory recognition of "recovery for personal injuries, pain and suffering, and other damages suffered prior to . . . death" at 6. Injuries to de la O are never described with particularity at any level of his pleadings. De la O sought to enjoin the enforcement of a trespass regulation, not to prove damages.

The types of damages recoverable under the survival statute include physical pain and suffering, medical and funeral expenses, and consciousness of impending death. *Tarrant County Hosp. Dist. v. Jones*, 664 S.W.2d 191 (Tex. App. – Fort Worth 1984, no writ). Claims based purely on mental or emotional injury are not cognizable under the statute. *Plumley v. Landmark Chevrolet, Inc.*, 122 F.3d 308, 311 (5th Cir. 1997). An action for damages to real or personal property survives the death of the owner. *Landers v. B.F. Goodrich Co.*, 369 S.W.2d 33 (Tex. 1963). The damage claims routinely made the subject of survival actions are not part of de la O's suit.

In the context of appeals, it has been held that the Texas appellate rule permitting the continuation of an appeal after the death of a party, former Tex. R. App. P. 9(a) (now Tex. R. App. P. 7.1(a)), requires that the trial court judgment must affect "the parties' property rights, as opposed to purely personal rights." *Olson v. Committee for Lawyer Discipline*, 901 S.W.2d 520, 523 (Tex. App. – El Paso 1995, no writ). Property rights are not involved in de la O's appeal.

The distinction between personal rights and money damages was examined in *Caine v. Hardy*, 943 F.2d 1406, 1410-11 (5th Cir. 1991), where the claim for damages was held to survive the death of plaintiff under the Mississippi survival statute. Survival was permitted, but the holding turned on the existence of a tangible damage claim. The

court viewed plaintiff's First Amendment claim as being analogous to a wrongful discharge action, which carried with it contractual and tort damages. The action, against the backdrop of the Mississippi statute, therefore, survived plaintiff's death. De la O does not have an analogous claim that would support money damages. More than nominal damages must be at issue.

Respondent does not dispute that the Texas survival statute, in certain circumstances, is broad enough to encompass federal civil rights statutes. The case at bar, however, does not involve such a circumstance. In applying the survival statute in the context of constitutional claims Texas cases appear to require meaningful personal injury. *Upton County*, 960 S.W.2d at 811-812, was concerned with wrongful termination and personal injury. Three of the cases relied on by the *Upton County* court, *id.* at 818, were *Clift v. Fincannon*, 657 F. Supp. 1535 (E.D. Tex. 1987), *Delesma v. City of Dallas*, 770 F.2d 1334 (5th Cir. 1985), *Hamilton v. Rogers*, 573 F. Supp. 452 (S.D. Tex. 1983). All dealt with severe personal injury.

Clift, 657 F. Supp. at 1538-39, was concerned with the drowning death of a quadriplegic patient hospitalized in a mental health and mental retardation facility. *Delesma*, 770 F.2d at 1336, involved the shooting of the plaintiff by a security guard at the State Fair of Texas. *Hamilton* dealt with harassment in the work place on the basis of race. The plaintiff alleged mental and emotional distress, which led to high blood pressure and other health problems. He died during the subsequent litigation. The suit dealt directly with personal injury based on discriminatory animus.

In the context of the Texas wrongful death statute, Tex. Civ. Prac. & Rem. Code §71.002, it has expressly held that there can be no recovery of nominal damages. *Forney v. Memorial Hosp.*, 543 S.W.2d 705 (Tex. Civ. App. – Beaumont 1976, writ ref'd n.r.e.), *citing McGown v. Internat'l G. N. R. Co.*, 85 Tex. 289, 20 S.W. 80 (1892).

II.

The Claims of Petitioner Are Moot

The common factual basis in *Clift*, *Delesma*, and *Hamilton* is that there was clear injury, under the survival statute, to the "health, reputation or person" of the respective decedents. Injury must be claimed and ultimately proven under the statute. The Fifth Circuit, accordingly, has not engaged in a "drastic departure"[1] from the law of the forum state. Petition for Writ of Certiorari at 5. De la O had no such injury, and his claims are moot.

While the Texas Supreme Court has not spoken to the survival of constitutional claims, it has dealt with the

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[1] A portion of petitioner's argument is misplaced in this regard, and deserves comment. Petitioner incorrectly argues that *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 122 S.Ct. 2080 (2002) controls the outcome of de la O's underlying constitutional claim. Petition for Writ of Certiorari at 4-5. Respondent disagrees with this assertion. *Watchtower* did not deal with forum analysis; *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 103 S.Ct. 948 (1983), *Cornelius v. NAACP Legal Defense and Educ. Fund, Inc.*, 473 U.S. 788, 105 S.Ct. 3439 (1985), and their progeny continue to be applicable to the use of publicly owned property. While it is difficult to ignore this substantive issue, it is not now before the court. Respondent, however, feels obliged to briefly address petitioner's argument.

mootness doctrine. At least two exceptions have been recognized to the doctrine: (1) the "capable of repetition" exception, and (2) the "collateral consequences" exception. *FDIC v. Nueces County*, 886 S.W.2d 766, 767 (Tex. 1994); *General Land Office v. OXY U.S.A., Inc.*, 789 S.W.2d 569, 571 (Tex. 1990). The first exception is closely allied with still a third exception (as yet unrecognized by the Texas Supreme Court) labeled the "public interest" exception. *Nueces County*, 886 S.W.2d at 767. Common to both the "capable of repetition" exception and the "public interest" exception is the circumstance that there is no effective way to review an issue that most likely will be repeated. *Id.* This normally occurs where "the challenged act is of such short duration that the appellant cannot obtain review before the issue becomes moot." *Spring Branch I.S.D. v. Reynolds*, 764 S.W.2d 16, 18 (Tex. App. – Houston [1st Dist.] 1988, no writ). *See also, Iranian Muslim Org. v. City of San Antonio*, 615 S.W.2d 202 (Tex. 1981).

In the case at hand, the sole bar to the appeal is the unfortunate death of Jesus de la O. No short lived ruling nor temporary order is at issue. Should door-to-door solicitations be banned by the Housing Authority in the future, this act could be challenged in a deliberate fashion through normal trial and appeal. Any purported intrusion on constitutional protections would not evade appellate review.

The "public interest exception" was judicially sanctioned at the intermediate appellate level in *University Interscholastic League v. Buchanan*, 848 S.W.2d 298, 304 (Tex. App. – Austin 1993, no writ) a case involving age restrictions in high school athletic competitions. The Texas Supreme Court, however, did not determine whether this was a viable exception, and found it unnecessary to reach

the issue in the later case of *Nueces County*, 886 S.W.2d at 767.

The "collateral consequences" exception is applicable when prejudicial events have occurred and continue "to stigmatize helpless or hated individuals long after the unconstitutional judgment has ceased to operate." *Spring Branch I.S.D.*, 764 S.W.2d at 19. Examples of such stigmas include temporary mental commitments (*State v. Lodge*, 608 S.W.2d 910 (Tex. 1980)) and criminal convictions of juveniles sentenced to compulsory incarceration (*Carrillo v. State*, 480 S.W.2d 612 (Tex. 1972)). Only by an appeal may the individual exonerate himself from the deleterious collateral effects of commitment or incarceration. Because the mootness doctrine would block the efforts to remove the stigmas of mental commitment or juvenile delinquency, an exception was judicially crafted. Even a cursory review of the "collateral consequences" exception establishes that it has nothing to do with de la O's claim.

Moreover, no other exception discussed herein appears to be applicable to the survival of de la O's claims. This leaves the Housing Authority with its initial conclusion intact. The requirement in the survival statute of an injury to the "health, reputation or person" of a claimant, taken together with the strong Texas policy against advisory opinions, *Firemen's Ins. Co. v. Burch*, 442 S.W.2d 331, 333 (Tex. 1968), indicates that de la O's cause of action did not survive. The caselaw of Texas, notwithstanding the general language about the survival of civil rights litigation in some cases, supports this conclusion.

III.

The Texas Survival Statute Is Consistent With Federal Protections

If the Texas survival statute does not permit survival of de la O's suit, then the question remains as to whether the statute is inconsistent with the Constitution and laws of the United States. *Burnett v. Grattan*, 468 U.S. 42, 104 S.Ct. 2924 (1984). In *Robertson v. Wegmann*, 436 U.S. at 594, 98 S.Ct. at 1996, it was held that, "A state statute cannot be considered 'inconsistent' with federal law merely because the statute causes [a] plaintiff to lose the litigation." That is all the Texas statute does; it does not have any adverse effect, in and of itself, on the policies underlying Section 1983. *Id.*, 436 U.S. at 594, 98 S.Ct. at 1997. The survival statute is not part of a state law scheme to deny federal rights. There is no claim that "state law is generally inhospitable to the survival of §1983 actions." *Id.* The survival statute is not inconsistent with federal protections, and should be enforced.

CONCLUSION

For the reasons stated herein, this court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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August 13, 2002

TO COUNSEL LISTED BELOW

No. 00-50702 – Jesus De La O vs. Housing Authority of the City of El Paso

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Dear Counsel:

The court has requested additional simultaneous letter briefs to be filed on or before August 26, 2002, addressing whether, as a result of the death of Appellant, this action can continue? Restated, can another party be substituted for the Appellant? *See, e.g., Caine v. Hardy*, 943 F.2d 1406, 1410-11 (5th Cir. 1991) (en banc). The briefing should include, but is not limited to:

> (1) what law controls survival *vel non* of this 42 U.S. [sic] § 1983 action; and
>
> (2) whether survival of the action turns on the relief sought/rights at issue (including whether personal or property). *See, e.g., Olson v. Comm'n for Lawyer Discipline*, 901 S.W. 2d 520 (Tex. App. 1995).

Very truly yours,

CHARLES R. FULBRUGE III,
Clerk

By: /s/ Geralyn A Maher
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Calendar Clerk
504-310-7630

/gam

Mr. Fernando J. Chacon
Mr. Edward W. Dunbar